6-1-1976

Recent Cases

RECENT CASES

OLIVER A. PARKER*

RIGHT TO SUE

Pfizer, Inc. v. Lord, 522 F.2d 612 (8th Cir. 1975).

This appeal stems from two interlocutory orders rendered in a treble damage suit under the Clayton Act (Act). The first order decreed that the governments of India, Iran, the Philippines and South Vietnam are "persons" under the Act and are entitled to sue to collect damages resulting from an alleged conspiracy to fix prices on antibiotics purchased by the governments. The second order held that the governments have standing to sue as *parens patriae* to collect damages for antibiotics sold to the plaintiffs' citizens without complying with the requirements of Rule 23 of the Federal Rules of Civil Procedure for class actions (Rule 23).

The district court refused to certify the first order and the defendants, Pfizer, Inc. and five other major pharmaceutical firms, sought review by means of mandamus. The court noted that the district court "was presented with a difficult question of statutory interpretation, apparently of first impression," and that even if the district court's "interpretation were erroneous (the court intimated no view on the merits), under the circumstances it would not constitute a clear abuse of discretion" warranting the issuance of the writ.

As to the second order (which was certified by the district court), the defendants relied for reversal on the holding of *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972). In *Hawaii*, the Supreme Court ruled that a state could not bring a *parens patriae* action to collect the damage claims of its citizens if they were legally entitled to sue in their own behalf on the grounds that such suits violate the Due Process Clause of the Fifth Amendment.

The plaintiffs attempted to distinguish *Hawaii* on the grounds that in the present action foreign governments and their resident nationals were

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involved and "that the relationship between a foreign government and its citizens is not restricted by the Constitution of the United States" [citing *Misc. Order No. 74-37, Appendix* at 18, 21].

The court rejected the plaintiffs' argument, holding that foreign sovereigns do not possess the right to press their citizens' claims in a manner barred to domestic states vis-à-vis their citizens. The court further intimated (but did not decide) that unless the foreign nationals whose treble damage claims were being litigated were given notice of, and an opportunity to participate in, or exclude themselves from, the litigation, their property rights under the Fifth Amendment would be violated [citing *Guesseſeldt v. Mcgrath,* 342 U.S. 308 (1952) and *United States v. Pink,* 315 U.S. 203, 228 (1942)]. The court also suggested that if the district court's holding that foreign governments are "persons" who are entitled to sue under the Act is ultimately upheld, then the plaintiffs can pursue their citizens' treble damage claims by complying with the requirements of Rule 23 for class actions.

The petition for a writ of mandamus was denied and the order of the district court allowing the plaintiffs' *parens patriae* suit was reversed.

REGULATION OF FOREIGN COMMERCE

Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd., 402 F.Supp. 244, 251 (1975).

Plaintiffs, Zenith Radio Corp. and several other American manufacturers of electronic products, brought a treble damage antitrust action under the Antidumping Act of 1916 and Section Two of the Robinson-Patman Act against Matsushita Electric Industrial Co., Ltd. and thirteen other Japanese manufacturers, their distributors, and their importers.

The plaintiffs alleged that the defendants discriminated in price between different purchasers of commodities of like grade and quality by selling their products to purchasers in the United States at prices less than those charged to purchasers of those same products in Japan.

The defendants moved to dismiss the Antidumping action on the grounds that the act was unconstitutionally vague, and to dismiss the Robinson-Patman action because the act does not apply to price discriminations between products sold in the United States and those sold in foreign countries.

As to the Antidumping action, the court felt that the defendants' motion was totally devoid of merit and "that the Antidumping Act of 1916, which prohibits systematic price discrimination between purchasers in different national markets when the discrimination is practiced with a predatory intent, gives potential defendants sufficient notice of the conduct it proscribes" to survive the constitutional scrutiny mandated by the Due Process Clause of the Fifth Amendment.

In construing the Robinson-Patman Act, the court agreed with the defendants that the term "commodities" as used in the clause "where such commodities are sold for use, consumption, or resale within the United States . . ." refers to the same commodities referred to in the phrase "to discriminate in price between different purchasers of commodities of like grade and quality"; and that therefore, the commodities involved in both legs of an alleged price discrimination must be sold for use, consumption, or resale within the United States [citing the *Report of the White House Task Force on Antitrust Policy* (1968), Appendix C at 5-6]. In reaching this conclusion, the court rejected the plaintiffs' "*in terrorem*" argument that a refusal to extend the reach of the Robinson-Patman Act to include price discrimination between purchasers in different national markets would undermine the broad national policy reflected in the antitrust laws of fostering fair and vigorous competition in the United States on the grounds that the Antidumping Act of 1916 provides a more than adequate remedy for any alleged unfair pricing practices.

The defendants motion to dismiss the Antidumping action was denied, and the Robinson-Patman action was dismissed.

LIABILITY OF AIR CARRIERS

(1) *Day v. Trans World Airlines, Inc.*, 528 F.2d 31 (2d Cir. 1975).

The litigation giving rise to this appeal revolves about the personal injury claims of the victims of a terrorist attack at the Hellenikon Airport in Athens, Greece. At the time of the attack, the plaintiffs, in preparation for embarkation, had surrendered their tickets, passed through passport control, and entered the area reserved exclusively for those about to depart on international flights. The passengers assembled, under the direction of TWA's agents, by the departure gate and were preparing for a wapons search which was a prerequisite to boarding. Otherwise, the passengers were ready to proceed to the aircraft. On these facts the district court

found TWA liable under Art. 17 of the Warsaw Convention as modified by the Montreal Agreement (Convention) for the deaths and bodily injuries resulting from the terrorist attack.

On appeal, TWA contended that liability under the Convention should not attach while passengers are inside the terminal building, and that the very earliest time at which liability ought to commence is when the passengers step through the terminal gate. To support this claim, TWA relied on the rejection by the delegates to the convention of the CITEJA draft providing for liability from the moment the passenger enters the airport of departure.

In rejecting TWA's argument, the court noted that the delegates also rejected Brazil's proposal that liability not attach until after the passengers were actually inside the aircraft. In the court's view, under the provisions of Art. 17, the issue was not whether the passengers had been inside or outside the terminal building, but whether they had begun the process of embarkation. Given the passengers' activity (which was a condition to embarkation), the restriction on their movements, the imminence of boarding, and their position adjacent the terminal gate, the court held that it would best comport with the Montreal Agreement's intent to impose strict liability without fault and to spread as widely as possible the risk of loss to hold that the plaintiffs were in the course of embarkation and that the defendant was liable under the Convention.

The lower court's finding of liability was affirmed.

(2) *In Re Tel Aviv*, 405 F.Supp. 154 (1975)

Plaintiffs, victims of a terrorist attack in the baggage area of the terminal building at Lod International Airport near Tel Aviv, Israel, brought an action against Air France under Art. 17 of the Warsaw Convention as modified by the Montreal Agreement (Convention) to recover damages for the deaths and personal injuries that resulted from the attack.

Air France moved for summary judgment on the ground that the Convention was inapplicable to these actions. The plaintiffs filed cross-motions for partial summary judgment on the issue of liability, asserting that the Convention did apply.

The material facts were undisputed. On arrival at Lod Airport, the plane came to a halt about one-third to one-half mile from the Terminal Building. The plaintiffs descended movable stairs to the ground and then walked or rode on a bus to the terminal. There, they presented their pass-

ports for inspection by Israeli immigration officials and then passed into the main baggage area of the terminal. While the passengers were awaiting the arrival of the last baggage from the plane, three Japanese terrorists opened fire. From the time the plaintiffs stepped out onto the movable stairs leading from the plane, all the facilities they used were owned and operated by the State of Israel or El Al, the Israeli National Airline and not by Air France.

Air France's argument was that when the terrorist "attack occurred, the passengers, all of whom had exited the aircraft and entered the Terminal Building, were no longer in the course of any of the operations of disembarking, and hence, that the Convention did not apply to the plaintiffs' claims."

In finding for the defendant, the court referred to *Day v. Trans World Airlines, Inc.*, 393 F.Supp. 217 (1975), aff'd 528 F.2d 31 (2d Cir. 1975), which distinguished disembarkation on the grounds that "a passenger who has left the aircraft, unlike the plaintiffs in *Day*, is not herded in lines, and has few activities, if any, which the air carrier requires him to perform . . . as a condition of completing his journey." The court held that an accident that occurs inside the baggage area of an airport after the passengers have arrived at their destination has not occurred in the course of disembarking operations and is not covered by the Convention [citing *MacDonald v. Air Canada*, 439 F.2d 1402 (1st Cir. 1971)].

Complaints dismissed to the extent that they claimed jurisdiction or liability without fault under the provisions of the Warsaw Convention.

IMMIGRATION

Pierre v. United States, 525 F.2d 933 (5th Cir. 1976).

The petitioners, 216 Haitian nationals, applied for a preliminary injunction to enjoin the Immigration and Naturalization Service from refusing to authorize their employment pending final administrative and judicial determination of their initial claim for refugee status pursuant to the United Nations Convention and Protocol Relating to the Status of Refugees (Convention). The district court held that it lacked jurisdiction to grant the relief sought and the petitioners appealed.

The issue on appeal was "whether, in a suit seeking habeas corpus relief, the court has jurisdiction under its general equity powers to enter-

tain an application for a mandatory injunction to require collateral administrative action independent of, and unrelated to, the issue of the legality of the petitioners custody."

In deciding the issue, the court rejected the argument that because 8 U.S.C.A. §1182 (a)(14) prohibits aliens from seeking to enter the United States for the purpose of performing skilled or unskilled labor unless the Secretary of Labor certifies to the Secretary of State that they may enter, the lower court lacked jurisdiction. The court held that the application of § 1182 (a)(14) to those seeking political asylum would, as a practical matter, frustrate the intent behind the Convention. Hence, the court ruled that the rights created by the convention were unaffected by the limitations of § 1181(a)(14).

Though the court disagreed with the lower courts reasoning, it concurred with the result, holding that the jurisdiction conferred by a writ of habeas corpus is confined to an examination of the record to determine whether a person restrained of his liberty is detained without authority of law, and that the only power the court possessed under the writ was the power to release the petitioner if he was found to be unlawfully detained [citing *Harlan v. McGourin*, 218 U.S. 442 (1910) and *Fay v. Noia*, 372 U.S. 391 (1963)].

To reconcile its holding with the obvious intent of the Convention, the court noted that it was only determining a court's authority under a writ of habeas corpus and that its decision did not foreclose the possibility that the petitioners might have standing to seek an independent action for declaratory or injunctive relief under either 8 U.S.C.A. § 1329 or 28 U.S.C.A. § 1331.

The decision below was affirmed.

INTERPRETATION OF TREATIES

United States v. A. L. Burbank & Co., Ltd, 525 F.2d 9 (2d Cir. 1975).

An action was brought to enforce two summonses which had been issued by the Internal Revenue Service (IRS) to obtain information requested by Canadian tax authorities pursuant to the Tax Treaty of 1942 between the United States and Canada (Treaty). The district court held that absent a claim that United States income taxes are potentially due and owing, the IRS could not properly utilize its summons authority under the

1954 Internal Revenue Code (Code), section 7602, to obtain information from American based companies solely for a Canadian tax investigation. The United States appealed.

The parties agreed that the purpose of the Treaty was to provide a means of cooperation between the United States and Canada whereby information could be exchanged after it was collected through the administrative processes provided by the statutory law of each nation, and that the avowed intent behind the Treaty was to prevent tax evasion. Further, the Treaty specifically provided that if Canada desired information to determine the liability of any person under Canadian revenue laws, the IRS could furnish the same information that it would be entitled to obtain under the United States Revenue Code. Finally, it was admitted that there was nothing in the Treaty to indicate that this procedure could only be employed in a case where there was concurrent tax liability in both nations.

To circumvent the plain language of the Treaty, the appellees noted that under Canada's construction of the Treaty, Canadian tax authorities are authorized to obtain information relevant to United States tax evasion if, and only if, there is a possibility of concurrent Canadian tax liability. Hence, the appellees argued that since the intent of the Treaty was to provide for the exchange of information on a reciprocal basis, the United States should not be under a greater obligation to furnish information than is Canada.

The appellees also argued that under section 7602 of the Code the IRS could only issue a summons to force the production of books and records to determine the liability of any person for any internal revenue tax of the United States.

The court rejected the appellees' first argument on the grounds that "until a treaty has been denounced, it is the duty of both the government and the courts to sanction the performance of the obligations reciprocal to the rights which the treaty declares and the government asserts, even though the other party to the treaty holds a different view of its meaning" [citing *Factor v. Laubenheimer* 290 U.S. 276, 298 (1933)].

As for the second argument, after examining both the Treaty and the Code, the court concluded that in view of section 7852(d) of the Code which provides that "no provision of the Code shall apply in any case where its application would be contrary to any treaty obligation of the United States in effect on the date of the enactment of the Code," the

limitation of the IRS's subpoena powers under section 7602 did not apply, and the IRS could subpoena records for the Canadian Government.

The decision below was reversed.

ADMIRALTY JURISDICTION

Koupetoris v. Konkar Intrepid Corp., 402 F.Supp. 951 (1975).

Plaintiff, a Greek seaman, brought suit under the Jones Act, 46 U.S.C.A. § 688 *et seq.*, and general maritime law to recover for injuries he allegedly sustained aboard the *Konkar Intrepid*, a vessel of foreign registry, while the ship was in Baltimore harbor.

The defendant, Konkar Intrepid Corp., a Liberian corporation whose principal stockholders were Greek and whose principal offices were in Athens, Greece, moved for an order dismissing the complaint for lack of jurisdiction over the subject matter, or alternatively, for improper venue on the doctrine of *forum non conveniens.*

The court noted that no diversity jurisdiction existed since both the plaintiff and the defendant were aliens [citing *Joseph Muller Corp. v. Societé Anonyme de Gerance et d'Armement*, 451 F.2d 727, 729 (2d Cir. 1971), *cert.* denied, 406 U.S. 906 (1972)], and that whether plaintiff's general maritime law claim raised a federal question under 28 U.S.C.A. § 1331 depended on the applicability to the facts of the Jones Act [citing *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959)].

The court found that the applicability of the Jones Act depended on the substantiality of the contacts of the controversy with the United States, and that of the seven factors of possible significance which a court might consider in deciding the question, four (place of the ships registry, place of the injury, place where the seaman's contract was made, and the inaccessibility of a foreign forum) have been accorded relatively little importance, while the allegiance of the parties and the shipowner's base of operations have been accorded the greatest significance [citing *Moncada v. Lemuria Shipping Corp.*, 491 F.2d 470, 472 (2d Cir.), *cert.* denied, 417 U.S. 947 (1974)]. Hence, the court held that the benefits of the Jones Act are not available in a suit against a foreign shipowner by a nonresident seaman who seeks redress for injuries sustained on a vessel of foreign registry where the foreign shipowner's major base of operations is outside the United States, even though the injury complained of occurred within the United States.

While the court lacked diversity jurisdiction and though no federal question was presented because the Jones Act was not applicable, the court, *sua sponte*, found that 28 U.S.C.A. § 1333 conferred admiralty subject matter jurisdiction over the subject matter of the plaintiff's claim for injuries, even though the plaintiff had not invoked the court's admiralty jurisdiction [citing Gilmore &Black, *The Law of Admiralty* 40 (2d ed. 1975)]. However, the same facts that ruled against subject matter jurisdiction under the Jones Act led the court to decline jurisdiction under the doctrine of *forum non conveniens* on the grounds, among others, that the defendant had consented to appear before the appropriate court in Greece, and had waived any defenses based on the statute of limitations or personal jurisdiction [citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947) and *Garis v. Compania*, 386 F.2d 155 (2d Cir. 1967)].

Complaint dismissed.

LIABILITY UNDER CARRIAGE OF GOODS BY SEA ACT

Cerro Sales Corp. v. Atlantic Marine Enterprises, Inc., 403 F.Supp. 562 (1975).

The plaintiff, Cerro Sales Corp. (Cerro), entered into a voyage charter party with the defendant, Atlantic Marine Enterprises, Inc. (Atlantic), the owner of the *S.S. North America*, to convey a cargo of copper concentrates from San Fernando, in the Philippines, to Callao, Peru. While on route, a fire broke out in the boiler room of the *North America* and due to the seriously understaffed condition of the ship, the fire spread and the *North America* had to be abandoned.

Cerro filed suit under the Carriage of Goods by Sea Act (COGSA), which had been incorporated into the charter party, for cargo loss and transshipment expenses.

Atlantic defended on the grounds that (1) the damages were barred by the statute of limitations provisions of COGSA, that (2) under both the Fire Act (46 U.S.C.A. § 182) and the fire exceptions of COGSA, the defendant was not liable, and that (3) in the event of liability, liability should be limited to ship plus freight pursuant to 46 U.S.C.A. §§ 181-88.

Under COGSA, if a suit is not brought within one year of delivery of the goods or the date when the goods should have been delivered, then the action is barred. Had the fire not occurred, the court found that the goods should have been delivered by July 16, 1968, but that the suit was

not filed until July 23, 1969. Cerro argued that it was informed by a letter dated July 26, 1968 of the frustration of the voyage and asked to take delivery in Honolulu, that delivery at that point constituted a reasonable deviation under the "liberty clause" of the charter party, that the cargo was not actually relinquished until that date, and hence, that it was as of that date that the statute of limitations began to run.

In deciding for the plaintiff on the limitations issue, the court reasoned that if Atlantic was not personally at fault for the damage, the delivery in Hawaii would be in furtherance of the agreement of the parties and the statute would have begun to toll as of the date of delivery, while if the defendant were personally responsible for the fire, the one year statute of limitations would not be applicable [citing *United States v. Wessel, Duval & Co.*, 115 F.Supp. 678 (1953), and cf. *Minex v. International Trading Co.*, 303 F.Supp. 205 (1969)]. In either event, the statute would not bar recovery.

As to the fire exemption issue, the court noted that "an inexcusable condition of unseaworthiness of a vessel, which in fact causes the damage by either starting a fire or preventing its extinguishment, will exclude the shipowners from the exemption of the Fire Act and COGSA" [citing *Asbestos Corporation, Ltd. v. Compagnie de Navigation Fraissinet et Cyprien Fabre*, 480 F.2d 669 (2d Cir. 1973)]. Since the court found that the ship was unseaworthy because it was so understaffed that the crew was inadequate to handle a fire emergency, the court ruled for the plaintiff and held Atlantic liable for the damages.

As to the question of limitation of liability under 46 U.S.C.A. §§ 181-88, the court held that because Atlantic was culpably negligent, the limitation of liability for loss could not be granted [citing *Commercial Molasses Corp. v. New York Tank Barge Corp.*, 314 U.S. 104 (1941) and *Flanagan v. The H. F. Gilligan*, 170 F.Supp. 217 (1959)].

Accordingly, the court found the defendant liable for Cerro's damages from loss of cargo.